

APR 10 1996

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No. 95-1184

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

DANIEL R. GLICKMAN, Secretary of Agriculture,
Petitioner,

v.

WILEMAN BROS. & ELLIOTT, INC.; KASH, INC.;
GERAWAN FARMING, INC.; ASAKAWA FARMS, INC.;
CHIAMORI FARMS, INC.; PHILLIPS FARMS, INC.; KOBASHI
FARMS, INC.; TANGE BROS., INC.; NAGAO FARMS;
NILMEIER FARMS; CHOSEN ENTERPRISES; GEORGE
HUEBERT FARMS; WILMER HUEBERT FARMS; KOBASHI
FARMS, NAKAYAMA FARMS, INC.; and MIHARA FARMS,
Respondents.

**On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Ninth Circuit**

**RESPONDENTS' OBJECTIONS TO MOTIONS FOR
LEAVE TO FILE BRIEFS OF AMICI CURIAE AND
OPPOSITION TO AMICI CURIAE BRIEFS FILED IN
SUPPORT OF PETITION FOR WRIT OF
CERTIORARI**

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INTRODUCTION

Respondents object to the motions for leave to file amicus curiae and amici curiae briefs, and oppose the amicus curiae and amici curiae briefs filed in support of the Petition for Writ of Certiorari. Three amici curiae briefs have been filed in support of the Solicitor General's Petition: (1) On

March 25, 1996 Respondents received the Motion for Leave to File Brief of Amici Curiae and Brief of Amici Curiae from various California, Washington, and Idaho state agricultural commodity commissions and boards in Support of the U.S. Solicitor General's Petition for Writ of Certiorari ("Program Amici")¹; (2) On March 25, 1996 Respondents received the Brief of Amici Curiae of the Attorneys General of various states in support of the U.S. Solicitor General's Petition for Writ of Certiorari ("Attorneys General"); and (3) On March 28, 1996 Respondents received the Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae National Association of State Departments of Agriculture in Support of Petitioner ("NASDA").

These amici duplicatively represent the same state government agencies and burden the Court, repeat the same arguments as Petitioner, do not aid the Court in disposition of the Petition, defeat Petitioner's argument that USDA's forced funded generic advertising cannot meet the *Central Hudson Gas and Electric Corp. v. Public Service Comm'n. of New York*, 447 U.S. 557 (1980) commercial speech test, and misleadingly list state boards and commissions without clarifying that many do not engage in mandatory assessment funded generic advertising of agricultural products and as such are not impacted by the Ninth Circuit decision.

¹ Some individual growers and industry members are listed as represented but no point of view is shown on their behalf distinct from the state agencies' interest.

ARGUMENT

A. The Amici Briefs Overlap Substantially in Their Representation of the Same State Government Agencies Thereby Burdening The Court and Confusing The Issues

Respondents did not consent to the NASDA and Program Amici briefs because they overlap substantially in their representation of the same governmental agencies without providing unique points of view and thus burden the Court and confuse the issues.

The Program Amici and NASDA motions each list the same pending cases and complain that because their members are parties to those cases they have an interest in the Solicitor General's Petition. The Program Amici motion lists *Bidart Bros. v. California Apple Comm'n.*, No. CV-F-94-6018-OWW (E.D. Cal.); *Duarte Nursery, Inc. v. California Grape Rootstock Improvement Comm'n.* No. CV-F-95-5428-OWW (E.D. Cal.); *Matsui Nursery, Inc. v. California Cut Flower Comm'n.* No. CV-S-96-102-EJG (E.D. Cal.) and one California state court case captioned *California Kiwifruit Comm'n. v. Moss*, No. C018368 (3d Dist. Cal.App.). See, Program Amici Motion p. 1. Except for the state court kiwi case, the NASDA motion lists all the same cases and states that NASDA members are parties to those cases. See, NASDA motion.

The Program Amici list various state agricultural commissions and boards represented. See, App. A to Program Amici motion and brief. Twenty of the commissions and boards listed by the Program Amici are also listed by the Attorneys General. See, App. to Attorneys General Brief pp. 1-4. These commissions and boards are arms of the state departments of agriculture and NASDA is an organization

whose membership consists of state departments of agriculture (plus agencies of United States territories).

The NASDA, Program Amici, and Attorneys General briefs thus needlessly substantially duplicate the representation of the same governmental agencies in a concerted effort to take several bites at the apple, and in an attempt to inflate a view that the petition presents an important question. This overlapping of the briefs, however, does not help in analyzing the disposition of the Petition, confuses the issues, and wastes valuable Court time. The motions for leave to file should be denied.

B. The Amici Repeat The Same Arguments As Petitioner And Do Not Otherwise Show That USDA Met Its Burden Under *Central Hudson*

NASDA and the Program Amici merely say "me too" to the arguments raised by USDA in the Solicitor General's petition and provide no help in the disposition of the Petition.² First, both NASDA and the Program Amici repeat Petitioner's argument that the Ninth Circuit should not have used *Central Hudson Gas and Electric Corp. v. Public Service Comm'n. of New York*, 447 U.S. 557 to analyze USDA's mandatory assessment funded generic advertising program for California peaches, plums, and nectarines imposed only on California handlers. Amici ignore that USDA argued the opposite before the Ninth Circuit and contended that *Central Hudson* was the appropriate test, and ignore that the Ninth Circuit opinion does not address this issue. See, Opp. to Pet. for Cert. pp. 5-8.

²The desires of amici concerning the outcome of the litigation are not evidence, and do not influence the Court's decision, and are looked to solely for aid in analyzing the legal questions before the Court. See, e.g., *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 434 n. 16 (1984) (discussing amici at merits stage).

Neither NASDA nor the Program Amici provide good reason to disregard this Court's teachings that the character of the speech compelled by the government determines the applicable scrutiny so that *Central Hudson* applies to compelled funding of commercial speech. See, Opp. to Pet. for Cert. pp. 9-14. NASDA and the Program Amici ignore that *Central Hudson* and the test now urged in the Solicitor General's Petition are both intermediate scrutiny and fail to explain how substituting one intermediate scrutiny test for another will end their averred uncertainty about whether their programs can survive the *Central Hudson* test. See, Opp. to Pet. for cert. pp. 19-20.³

Second, the Program Amici, NASDA, and the Attorneys General share in USDA's misunderstanding of the Ninth Circuit's disposition of this case under *Central Hudson*. "[Under *Central Hudson*] the government carries the burden of showing that the challenged regulation advances the government's interest 'in a direct and material way' [Citation Omitted]." *Rubin v. Coors Brewing Company*, ___ U.S. ___, 115 S.Ct. 1585, 1592. "That burden 'is not satisfied by mere speculation and conjecture . . .'" [Citation Omitted]." *Id.* The Ninth Circuit applied this requirement to the case at hand and found USDA failed to meet its burden. See, App. to Pet for Cert. p. 16a.

The amici repeat the Petitioner's arguments, however, and contend that the Ninth Circuit does not understand that government compelled funding of agricultural commodity advertising is aimed at increasing the whole market, not individual shares of market, and therefore the Ninth Circuit

³The amici complain about the Ninth Circuit's decision in *Cal-Almond, Inc. v. USDA* 14 F.3d 429 (9th Cir. 1993) which applied *Central Hudson* to USDA's generic advertising program for almonds. The government did not seek a Writ of Certiorari in that case, yet amici argue as if it too is subject to review. Seeking review in this case is not a device for review of *Cal-Almond*, 14 F.3d 429.

misconceived its analysis. Contrary to amici contentions, the Ninth Circuit understood the purported government aim. See, App. to Pet for Cert. pp. 16a-17a. The Ninth Circuit found that USDA hindered Respondents' protected commercial speech marketing efforts. See, App. to Pet. for Cert. p. 18a. USDA burdened Respondents' abilities to engage in their own commercial speech and failed to show that USDA's programs nonetheless materially advanced the purported aim of promoting the peach and nectarine growing industries which, under USDA's reasoning, was not occurring sufficiently through the efforts of individual advertising. USDA provided no evidence showing (that despite this burden on Respondents) USDA's purported aim was directly advanced. See, App. to Pet for Cert. pp. 18a-20a.

If USDA demonstrated anything, it was that it may have hurt increase in market by hindering Respondents' marketing efforts. This cannot be said to directly advance in a material way the purported government aim. Like the government's failure to present convincing evidence that its labeling ban inhibited "strength wars" among alcoholic beverage companies in *Rubin v. Coors*, ___ U.S. ___, 115 S.Ct. 1585, 1593, here USDA failed to prove that its regulation directly advanced its interest.

The Attorneys General brief supports the Ninth Circuit's decision on this point. The Attorneys General assert that government-mandated advertising increases market better than "uncoordinated private efforts," based on the premise that a threshold advertising spending level is required to realize an increase in market. Att. Gen. brief pp. 10-11. If the purported governmental aim is to achieve an increase in market that cannot occur through private efforts because private efforts do not sufficiently reach a threshold level of spending to increase market, then the government should show that its program in fact does do better than what occurs with only private individuals doing the advertising.

Otherwise, the governmental aim cannot be said to have been directly advanced.

Third, the amici arguments do not change the fact that USDA forced Respondents to pay for advertising their competitors' particular varieties thus USDA's argument that its program should have survived scrutiny under *Central Hudson* fails. See, Opp. to Pet. for Cert. pp. 14-19.

C. Read Together The Amici Briefs Defeat Petitioner's Argument That USDA's Compelled Agricultural Commodity Advertising Programs Cannot Meet The *Central Hudson* Test

The amici arguments undercut USDA's complaint that it cannot meet the *Central Hudson* test. While USDA, NASDA, and the Program Amici complain that government-mandated agricultural commodity advertising programs cannot meet the *Central Hudson* test, the Attorneys General argue that government forced funded agricultural commodity advertising does increase and support markets better than what the Attorneys General call "uncoordinated private efforts."⁴ Assuming, *arguendo*, the Attorneys General are correct, then USDA, the Program Amici, and NASDA's argument about their purported inability to meet the *Central Hudson* test fails.⁵

⁴The Attorneys General cite to studies not relied upon in litigation of this case by the USDA. See, Attorneys General Amici Curiae Brief table of authorities pp. iii-v. The studies have no bearing on the evidence in this case. See, *Sony Corp. v. Universal City Studios*, 464 U.S. at 434 n. 16. The Ninth Circuit simply pointed out that USDA had no studies or evidence to support its contentions. See, App. to Pet. for Cert. pp. 19a-20a.

⁵Moreover, arguing that, as amici and USDA do, *Central Hudson* should not apply because the government cannot survive the scrutiny of *Central Hudson* begs the question, and does not justify review on a claim that a different intermediate scrutiny test should apply.

D. Many Commissions and Boards Listed by the Attorneys General Do Not Engage In Mandatory Assessment Funded Generic Advertising Thus Any Suggestion That All The Programs Referenced Are Somehow Adversely Impacted By The Ninth Circuit Decision Is Misleading

The Attorneys General list state agencies and agricultural marketing, promotional, and advertising programs and recite, anecdotally, information about some of the programs. The Attorneys General did not explain the difference between marketing, promotion, and advertising and give the false impression that all these programs are impacted by this case. Respondents' anecdotal information suggests many listed boards and commissions do not engage in forced funded generic advertising.

For example, the California Wheat Commission, listed by both the Attorneys General and the Program Amici, is a body that derives its funding from mandatory grower assessments. The commission, however, has a program whereby any grower can request a *total* refund of all assessments paid to the commission. The only caveat is that the grower must request this refund within 90 days after it is paid. The commission does not engage in any promotional advertising activities. The commission only engages in research.

The Michigan Red Tart Cherry Advisory Board, listed by the Attorneys General, does not engage in mandatory assessment funded generic advertising. This advisory board is strictly an information and statistical gathering entity. There is no state government promotion or research done to promote red tart cherries. The committee is oriented to the benefit of growers. The information is used by the growers, packers, and handlers.

The New Jersey Wine Industry Advisory Council, listed by the Attorneys General, does not assess growers for generic advertising. Twenty cents per gallon is charged

either to the distributor or to the retail customer. Approximately \$20,000 is spent annually for advertising/marketing. The advertising/marketing consist of brochures, sponsoring wine and food festivals and promoting specific events.

The Washington Red Raspberry Commission, listed by the Attorneys General, derives its funding from mandatory assessments — ½ cent per pound paid by grower to the processor. Approximately 30 percent of these funds are used in research at Washington State University. There is no television, radio, or print advertising. Approximately 40 percent is spent on "promotions," described as working with food editors and other educational programs.

The Arizona Beef Council does not engage in generic advertising of beef supported by state law imposed assessments. (The council does participate in the USDA beef promotion program discussed in *United States v. Frame*, 885 F.2d 1119; See, e.g., 7 U.S.C. § 2904(4)(A)). The Arizona Wine Commission does not impose assessments for generic advertising. A point of sale charge is imposed, however, and revenue is used for wine promotion. In sum, listing programs and various state agencies without clarifying that not all engage in mandatory assessment funded generic advertising like the USDA programs in this case is misleading.

E. Conclusion

The amici unnecessarily substantially duplicate representation of the same governmental entities thereby burdening the Court and confusing the issues. The motions for leave to file brief of amici curiae and brief amicus curiae should be denied. The amici arguments support Respondents' position that the Petition should be denied.

Respectfully Submitted,

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